84-241

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Case No.:

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM GARVEY,

PETITIONER

VS

COMMONWEALTH OF PENNSYLVANIA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

ROBERT A. ROVNER, ESQUIRE
ROVNER, ALLEN, SEIKEN & ROVNER
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Attorney for Petitioner

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner denied his constitutionally guaranteed right to representation by a competent, effective counsel at trial, demanding that a new trial be granted?
2. Was the prosecutor's misconduct at trial such as to deprive petitioner of his right to have a fair trial by jury?
3. Was the newly discovered evidence of such caliber and weight as to alter the outcome of the trial?

TABLE OF CONTENTS

PAGE #	TITLE
2	Jurisdiction
3	Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit
3 -4	Opinion
5	Constitutional Provision Involved
5-6	Statement of Case
7-12	Reasons for Granting of the Writ
13	Conclusion
14-15	Proof of Service
16	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Criminal Div.*
17	Judgment*
18-27	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Criminal Div.*

TABLE OF CONTENTS

PAGE #	TITLE
28-31	Petition of Witnesses Under Oath
32-60	Testimony*

*These pages have been re-typed (to meet the Rules as stated) from copies which have been filed prior to this date and time.

TABLE OF AUTHORITIES

SUPREME COURT

Page 9 . . . Polk County v. Dodson, 454 U.S. 312 (1981).

Page 11 . . Williams v. U.S., 137 U.S. 413, (1890)

FEDERAL COURT

Page 10 . . .U.S. v. Homer, 545 F.2d 864 (1980)

STATE COURT

Page 22 . . . Hughes, Commonwealth v., 477,Pa. 180,187,383 A.2d

Page 26 . . . Jackson, Commonwealth v., 494 Pa. 457, 431, A.2d 944

Page 20 . . . Maroney, Commonwealth ex rel Washington v., 427 Pa. 599, 235 A.2d 349, 352-53 (1967)

Page 21 . . . Piper, Commonwealth v., 458 Pa. 307, 328 A.2d 845 (1974)

Page 20 . . . Ramsey, Commonwealth v., 259 Pa. Supr. 240, 246, 393 A.2d 806 (1978).

Page 22 . . . Van Cliff, Commonwealth v., 483 Pa. Supr. 576, 582, 397, A.2d, 1173 (1979)

TABLE OF AUTHORITIES

Page 26 . . . Walley, Commonwealth v., 262 Pa. Supr. 496, 506, 396 A.2d 1280 (1978)

TITLES AND CONSTITUTIONAL PROVISIONS

1. 28 U.S.C.A. 1254(1)

2. U.S. CONST. VI

3. U.S. CONST. XIV

JURISDICTION

On May 1, 1984, the Supreme Court of Pennsylvania, Eastern District, entered its Memorandum decision denying Petitioner's Petition for Allowance of Appeal. (App. "A"). The Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).[1]

SUPREME COURT OF THE UNITED STATES

WILLIAM GARVEY,

PETITIONER

vs.

COMMONWEALTH OF PENNSYLVANIA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioner, WILLIAM GARVEY, respectfully prays that a Writ of Certiorari issue to reveiw the judgment of the Supreme Court of Pennsylvania, Eastern District entered on May 1, 1984.

OPINION BELOW

The Supreme Court of Pennsylvania, Eastern District, entered its Memorandum decision denying Petitioner's Petition for Allowance of Appeal on May 1, 1984. A copy of the memorandum is attached as Appendix "A".

A Petition for Reconsideration was filed on May 31, 1984, with the Supreme Court of Pennsylvania, Eastern District.

Petition was denied on July 3, 1984. A copy of the denial is attached as Appendix "B".

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person...be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF CASE

The Appellant, WILLIAM GARVEY, was arrested and charged with murder, voluntary manslaughter, criminal conspiracy and involuntary manslaughter subsequent to an incident which occurred on December 8, 1979, at the Hilton Hotel following a Philadelphia Eagles defeat in a football game by the Dallas Cowboys at Veterans Stadium. The Appellant allegedly struck the right side of the victims face The victim suffered a brain hemorrhage, and subsequently died. Motions to suppress were filed and denied by the Honorable Edwin Malmed. Appellant was represented by Vincent La Russo, Esquire, at trial and was found guilty by a jury of third degree murder.

Post Verdict Motions were subsequently filed by new counsel, Nicholas Nastasi, Esquire, including allegations of ineffective assistance of trial counsel, and said Motions were denied by Judge Malmed on February 4, 1982. On February 17, 1982, Judge Malmed sentenced Appellant to not less than two and one-half and to not more than ten years imprisonment at Graterford.

On March 5, 1981, an Appeal was filed with the Superior Court for Appellant by present counsel, ROBERT A. ROVNER, ESQUIRE. On January 13, 1984, the Superior Court affirmed the decision per curiam.

On February 10, 1984, an Appeal was filed with the Supreme Court of Pennsylvania, Eastern District for Appellant by present counsel, ROBERT A. ROVNER, ESQUIRE, On May 1, 1984, the Supreme Court of Pennsylvania, Eastern District, denied Petitioner's Petition for Allowance of Appeal.

REASONS FOR GRANTING THE WRIT

Where petitioner is denied his constitutionally guaranteed right to representation by competent, effective counsel at trial, due process demands that a new trial be granted.

In the case at bar, petitioner's counsel at trial committed serious prejudicial errors that led to an improper conviction of the petitioner of third degree murder. First, trial counsel repeatedly allowed the Commonwealth to present prejudicial hearsay statements of unidentified individuals without objection. These statements falsely portrayed petitioner as an agressive argumentative and violent man. No objection to such obviously inflammatory statements was raised, nor were any limitive or cautionary instructions requested. Because the Commonwealth could not have established the requisite mens rea for third degree murder without these inadmissable

statements, there is no reasonable basis for failing to object to them.

Secondly, trial counsel failed to fully cross-examine and call rebuttal witnesses. The two chief Commonwealth witnesses at trial, Mr. McMeniman and Mr. Reaves, identified petitioner at trail as the man who struck the deceased. However, in their statements to homicide detectives after the indicent, neither man could identify petitioner. In fact, despite the apparent inconsistencies between the statements and trial testimony, trial counsel never called the detectives who took the statements to establish their validity.

Lastly, trial counsel did not question nor call twenty-five eyewitnesses who have sworn under oath that they heard a Gerald Gontz declare that he, and not petitioner, had "knocked out" a guy at the Hilton Hotel after the Eagles-Dallas football game on December 8, 1979. This vital evidence was not

at trial, but surfaced after petitioner had unjustly been convicted of third degree murder.

The High Court has frequently stated there can be no fair trial unless the accused received the services of effective counsel. See Polk County v. Dodson, 454 U.S. 312 (1981). This right to effective assistance of counsel is guaranteed by the 6th Amendment of the Constitution of the United States. U.S. CONST. amend VI. Further denial of this right prevented petitioner from receiving his 14th Amendment right to due process. U.S. CONST. amend XIV. In the present case it is clear that trial counsel made serious prejudidal errors resulting in an inappropriate verdict. The High Court has consistently held that the right to counsel means "effective counsel". Because petitioner was denied effective counsel at trial, a new trial should be granted.

The prosecutor's misconduct at trial was such as to deprive petitioner of his right to have a fair trial by jury, thus giving cause

to a new trial.

It has been consistently stated in our federal system that demonstrations of prosecutorial misconduct which prejudice the defendant call for a new trial. See U.S. v. Homer, 545 F2d 864, certiorari denied, 431 U.S. 954.

Several times during the course of the petitioner's trial, the District Attorney referred to petitioner as someone "looking for trouble" (N.T. 3/9/81, p.p. 7-107). The District Attorney also repeatedly referred to the punch allegedly thrown by petitioner as a "sucker punch" and a "cheap shot" (N.T. of 2/15/81, pp. 7-166). The prosecution acted in a vindictive manner to arouse the jury's prejudice. This hampered the jury from considering the evidence in a non-bias light and ultimately led to an impulsive verdict instead of a logical one. For this reason, petitioner asks to be granted a new trial.

Because evidence of such caliber and weight as to alter the outcome of the trial was discovered, a new trial should be granted in the interest of justice.

The Supreme Court in Williams v. U.S., 137 U.S. 413, (1890) stated that new discovered evidence, to be a ground to a new trial, should be such as would probably produce a different result. The evidence that was brought to present counsel's attention certainly would change the outcome of the trial. Twenty-five witnesses, under oath are willing to testify that Gerald Gontz, and not the petitioner, was the one who "knocked out" the deceased. With this new mass of evidence, no jury could fairly convict petitioner of third degree murder.

In addition, Gerald Gontz, by his own testimony at trial, admitted being the last person to have a physical altercation with the deceased. Because this new evidence makes the verdict, as it stands, unjust and inappropriate,

petitioner contends that a new trial should be granted.

CONCLUSION

For the foregoing reasons, petitioner, WILLIAM GARVEY, respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, Eastern District.

Respectfully submitted,

ROBERT A. ROVNER, ESQ.
ROVNER, ALLEN, SEIKEN & ROVNER
175 BUSTLETON PIKE
FEASTERVILLE, PA. 19047
Telephone: (215) 698-1800
Attorney I.D. #02322

Attorney for Petitioner

SUPREME COURT OF THE UNITED STATES

WILLIAM GARVEY,

PETITIONER

vs

COMMONWEALTH OF PENNSYLVANIA,

RESPONDENT

PROOF OF SERVICE

COMMONWEALTH OF PENNSYLVANIA:

SS

COUNTY OF PHILADELPHIA:

ROBERT A. ROVNER, ESQUIRE, after being duly sworn deposes and says that pursuant to Rule 28.4(a) of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Robert B. Lawler
Chief Appeals Division
Assistant District Attorney
1300 Chestnut Street
Philadelphia, Pennsylvania 19101

and depositing same in the United States mails at Philadelphia, Pennsylvania on June 29, 1984.

ROBERT A. ROVNER

Sworn to and Subscribed before me
this 29th day of June 1984.

Notary Public in and for said
County and State

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Marlene F. Lachman
Prothonotary
Patrick Tassos
Deputy Prothonotary

468 City Hall
Philadelphia, PA 19107
(215) 496-4600

May 11, 1984

Robert A. Rovner, Esquire
One Bustleton Pike
Feasterville, PA 19047

RE: Commonwealth of Pennsylvania v.
William Garvey
NO. 66 E. D. Alloc., Dkt., 1984

Dear Mr. Rovner:

This is to advise you that the following Order has been entered on the Petition for Allowance of Appeal, filed in the above-captioned matter:

"May 1, 1984

Petition Denied.

Per Curiam"

Very truly yours,

/s/

Patrick Tassos
Deputy Prothonotary

/bgl
cc: Robert B. Lawler, Esq.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Marlene F. Lachman
Prothonotary
Patrick Tassos
Deputy Prothonotary

468 City Hall
Philadelphia, PA 19107
(215) 496-4600

July 3, 1984

Robert A. Rovner, Esquire
One Bustleton Pike
Feasterville, PA 19047

RE: Commonwealth of Pennsylvania v.
William Garvey
NO. 66 E. D. Alloc., Dkt., 1984

Dear Mr. Rovner:

This is to advise you that the following Order has been endorsed on your Petition for Leave of Court to File Petition for Reconsideration of Denial of Petition for Allowance of Appeal, filed in the above-captioned matter:

"July 2, 1984

Petition for Leave to File Petition for Reconsideration denied.

NIX,
CHIEF JUSTICE."

Very truly yours,

/s/

Patrick Tassos
Deputy Prothonotary

/bgl
cc: Robert B. Lawler, Esq.

J. 1823/1983

COMMONWEALTH OF	:	IN THE SUPERIOR COURT
PENNSYLVANIA	:	OF PENNSYLVANIA
vs.	:	
WILLIAM GARVEY,	:	
APPELLANT	:	NO. 713 Philadelphia 1982

Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Criminal Division, at No. 1809 March Term, 1980

Before: McEWEN, BECK, and HOFFMAN, JJ.

PER CURIAM: Filed: Jan. 13, 1984

Affirmed.

J. 1823/1983

COMMONWEALTH OF	:	IN THE SUPERIOR
PENNSYLVANIA	:	OF PENNSYLVANIA
v	:	
WILLIAM GARVEY	:	No. 713
APPELLANT	:	Philadelphia 1982

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

J. Haniel Henry
Prothonotary

DATED: January 13, 1984

J. 1823/1983 - 1

COMMONWEALTH OF	:	IN THE SUPERIOR
PENNSYLVANIA	:	COURT OF
v	:	PENNSYLVANIA
WILLIAM GARVEY	:	No. 713
APPELLANT	:	Philadelphia 1982

Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Criminal Division, at No. 1809 March Term, 1980.

Before: McEWEN, BECK, and HOFFMAN, JJ.

MEMORANDUM OPINION:

Appellant alleges counsel's ineffectiveness for failing (1) to object to alleged prosecutorial misconduct and (2) to conduct adequate pre-trial investigation. We find these contentions meritless and, accordingly, affirm the judgment of sentence.

On December 8, 1979, after the Dallas Cowboys defeated the Philadelphia Eagles in a football game at Veteran's Stadium,

Philadelphia, a large crowd gathered at the nearby Hilton Hotel. During the course of the partying, appellant dealt a blow to the right side of the victim's face, causing a brain hemorrhage and the victim's subsequent death. Appellant was arrested and charged with murder, voluntary manslaughter, criminal conspiracy and involuntary manslaughter. On March 10, 1981, following the denial of suppression motions, appellant was found guilty by a jury of third degree murder. Post-trial motions were denied and appellant was sentenced on February 17, 1982 to two-and-one-half-to ten years imprisonment. This appeal followed.

In reviewing allegations of ineffective assistance of counsel, our courts have developed a two-step analysis:

> First, the court must decide whether the claim which counsel is charged with nor pursuing, has "arguable merit". If it

> does not, our inquiry ends there. If the claim does not possess such merit, we must then determine whether counsel's action or inaction had any reasonable basis.

Commonwealth v. Ramsey, 259 Pa. Superior Ct. 240, 246, 393 A.2d 806,____(1978). See Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 605-05, 235 A.2d 349, 352-53 (1967).

Appellant contends first that trial counsel was ineffective for failing to object to the prosecutor's references in his opening and closing statements to appellant's blow as a "sucker punch" and a "cheap shot", and to appellant as someone "looking for trouble". See N.T February 25, 1981, at 1.21; March 9, 1981, at 7.106, 7.107 [1] "[C]omments by the District attorney

---

[1] Appellant also raises the claim of prosecutorial misconduct as a separate issue in its own right. However, counsel's failure to object to the prosecutor's remarks at trial resulted in waiver of this issue on direct appeal. See Pa. R.A.P. 302(a) ("Issues not raised in lower court are waived and cannot be raised for the first time on appeal".) Commonwealth v. Piper, 458 Pa. 307, 328 A.2d 845 (1974). Therefore, we will address the issue only under the claim of ineffectiveness.

Appellant also alleges that the prosecutor's questioning of the two defense witnessess, appellant's father and Gerald Gontz, improperly conveyed to the jury that the witnesses' consultation with an attorney was evidence of criminal involvement or fabricated testimony. The claim is controverted by the record. See N.T. March 4, 1981, at 5.131-38,

5.156, 5.181; March 5, 1981 at 6.84, do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." Commonwealth v. Van Cliff, 483 Pa. 576, 582, 397 A.2d 1173, _____(1979). "A district attorney's remarks in his opening statement must be fair deductions from the evidence the Commonwealth in good faith expects to develop, not merely assertions intended to inflame the passions of the jury." Commonwealth v. Hughes 477 Pa. 180, 187, 383 A.2d 882,_____(1978). See also Prosecution Standard 3-5.8 (aA) of the 1979 American Bar Association's Standards Relating to the Administration of Criminal Justice ("The prosecutor may argue all reasonable inferences from evidence in the record".) Here, the terms used by the prosecutor were

taken from various witnesses' testimony. One Commonwealth witness characterized the blow as a "sucker punch" and characterized the attacker (identified as appellant by two other witnesses) as a person "looking for trouble". See N.T. March 3, 1981 at 4.95-96, 4.99, 4.101, 4.105. Another Commonwealth witness described appellant as "ready to go into a fight" and "revved up". See N.T. February 26, 1981 at 2.57, 2.58. It is clear that the prosecutor's remarks were not so prejudicial or unsupported by the evidence as to give rise to a meritorious claim. Therefore trial counsel was not ineffective for failing to object to these remarks.

Appellant contends also that trial counsel was ineffective for failing to conduct an adequate pre-trial investigation. He argues specifically that counsel was unprepared to discredit a Commonwealth witness, Andrew McMeniman, because he did not interview McMeniman before trial but confined himself to reading McMeniman's statement to the police. We find, however, that counsel had a reasonable basis for not interviewing McMeniman. In his statement and at trial, McMeniman only gave a physical and clothing description of the man who struck the victim and never positively identified appellant as that attacker. See McMeniman's Statement to Police, dated December 8, 1979 at 4; N.T. March 3, 1981 at 4.97-99, 4.114-15. Even without McMeniman's description, appellant was specifically identified by two other witnesses. See N.T. February 27, 1981, at 3.55, 3.72-74, 3.100; March 3, 1981 at 4.46-47, 4.52. Appellant

himself admitted that he had pushed the victim. See N.T. March 5, 1981 at 6.120. Moreover, counsel thoroughly cross-examined McMeniman at trial, discrediting him by eliciting testimony on his inability to "identify the white male who threw the punch", the amount he had to drink that day, and the number of people at the scene of the incident, and by insinuating that McMeniman had fabricated his testimony after talking to two other Commonwealth witnesses. [2] See N.T. March 3, 1981 at 4.109, 4.112-121

Accordingly, appellant's allegations of counsel's ineffectiveness are meritless and we must affirm the judgment of sentence. [3]

Affirmed.

[2] Appellant further alleges counsel's ineffectiveness for failure to call character witnesses. We find, however, that this ineffectiveness claim was waived because appellant did not address it in the argument section of his appellate brief. See Commonwealth v.

Jackson, 494 Pa. 457, 459 n.1., 431 A.2d 944, _____n.1. (1981). ("The 'Argument' Portion of the brief must separately address each claim presented....Failure to do so waives consideration of the claim.")

[3] In addition to the ineffectiveness claims, appellant alleges several trial court errors. He argues specifically that the trial court failed (1) to make clear to the jury that the standard of proof relates to each material element of the offense charged and (2) to issue corrective instructions after the medical examiner referred to the victim's death as "Homicide". See N.T. March 10, 1981 at 8.10; March 4, 1981 at 5.30. However, these claims are waived be counsel's failure to make specific objection thereto in the lower court. See Superior Pa. R.A.P. 302(b); Commonwealth v. Walley, 262 Pa. Superior Ct. 496, 506, 396, A.2d 1280_____(1978).

Appelant's last contention that the lower court's definition of "deadly force" was confusing to the jury and implied that the evidence compelled a finding that deadly force had been used is meritless. After reviewing the charge as a whole, see Commonwealth v. Lesher, 473 Pa. 141, 373 A.2d 1088 (1977), we find that it was not confusing and clearly stated that the jury was to be the sole trier of fact. See N.T. March 10, 1981 at 8.33, 8.35-37, 8.39.

ROBERT A. ROVNER, ESQ.
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175 BUSTLETON PIKE
FEASTERVILLE, PA. 19047
TELEPHONE: 698-1800

Attorney for Petitioner

TO WHOM IT MAY CONCERN:

In the interest of justice for William Garvey, please be advised that I, the undersigned will solemnly swear under oath, that I did hear Gerald Gontz declare that he, Gerald Gontz and not William Garvey, had knocked out a guy at the Hilton Hotel after the Eagles-Dallas football game on December the eighth, 1979.

[illegible]	[illegible] 19135
[illegible]	631 Marsden St.
[illegible]	[illegible]
[illegible]	[illegible]
337-3147 [illegible]	[illegible]
[illegible]	[illegible]
670-1199 [illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

673-3643

[illegible]

EXHIBIT "A"

TO WHOM IT MAY CONCERN:

In the interest of justice for William Garvey, please be advised that I, the undersigned will solemnly swear under oath, that I did hear Gerald Gontz declare that he, Gerald Gontz and not William Garvey, had knocked out a guy at the Bilton Hotel after the Eagles-Dallas football game on December the eighth, 1979.

ORI

[illegible]	1663 Lungkil Phila Pa 19149
DANIEL J. KINSLEY	1663 SURREY RD. PHILA.
[illegible]	[illegible]
MARGARET KINSLEY	1663 SURREY RD, PHILA.
[illegible]	[illegible]
[illegible]	322-6796 & 335-4160
[illegible]	[illegible]
[illegible]	9144 Mountain [illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

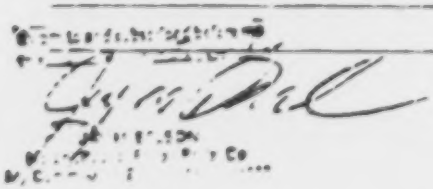
Sid 2055

[illegible]

[illegible]

TO WHOM IT MAY CONCERN:

In the interest of justice for William Garvey, please be advised that I, the undersigned will solemnly swear under oath, that I did hear Gerald Goris declare that he, Gerald Goris and not William Garvey, had knocked out a guy at the Fifth Estel after the Eagles-Dallas football game on December 8, 1979.



-30-

TO WHOM IT MAY CONCERN:

In the interest of justice for William Carney, please be advised that I, the undersigned will solemnly swear under oath, that I did hear Gerald Gotts declare that he, Gerald Gotts and not William Carney, had knocked out a guy at the Hilton Hotel after the Eagles-Dallas football game on December 8, 1979.

[illegible]

[illegible]

MICHAEL T. CARNEY

[illegible]

also here, and sitting over here, and he will testify for you this morning.

Joe went to the game with his friend, and his wife and son were home in Pennsauken. You will hear from Donna Wilkowski, his lovely wife, at the end of the trial.

Now, after the game, they went to the Hilton and there was an incident in the Hilton, and you will hear all about that. The incident, in effect, was a sucker punch. For those of you that do not know what a sucker punch is, and I would hope most of you do, it's an unexpected punch, an undefended punch, a cheap shot, and that's what this case is all about, a cheap shot.

As a result of the cheap shot, Joe Wiklowski was hit in the spot, and you will hear by the evidence

where this incident took place. He visited the scene very shortly after, after Joe Wilkowski was taken to the hospital. He took some photographs, and it's by these photographs of the sketches that you may be aided when the witnesses testify and they can point to certain spots.

Tom Polaski, a gentleman I pointed out, a best friend of the defendant, will testify that he was standing near him, and he will tell you what happened, that he was standing near the victim and that Joe was trying to hand him a glass that he had in his hand, a drink, had a glass in his hand at the time he was sucker punched, although he wasn't close enough to be able to make an identification of the person that punched him because of a few people that were between

A. No sir.

Q. Is there any question in your mind that the photo you picked out was the guy that gave Mike Miller the trouble?

A. No, that was him.

Q. Any question in your mind that this man you have identified today, the defendant, is the same man who gave Mike Miller the trouble?

A. No sir.

Q. No question in your mind.

A. No question.

Q. How would you describe the other man or any of the other men that were with him?

A. Well, the guy with the blond hair and brown corduroy jacket was standing back there. I didn't really notice him saying anything much.

There was another guy, I don't know who he was, but he appeared to be with them, and the the older guy, he was, I would say, about

forty years old that was to his right, they were all there.

MR. LORUSSO: Could we read back that last part, please?

BY MR. RICHARDSON:

Q. So you didn't have a belligerent looking for trouble attitude when you had that confrontation with these fellows, with Mike Miller here.

A. No.

Q. No, and you didn't have a belligerent looking for trouble attitude when you said, "Where the fuck are you walking," and pushed him.

A. No.

Q. And you heard and saw Jim Reives identify you as the guy that had this incident with Mike Miller, and it was you, wasn't it?

A. Yes.

Q. And you heard and saw Andy McMeniman tell this jury that the guy that had the trouble with Mike Miller, the guy wearing the jacket, was the same guy that walked over and punched, sucker punched, Joe Wilkowski.

You heard him say that, didn't you?

A. Yes, sir.

Q. Was he mistaken?

your lives, things that you know and things make sense, some things don't make sense. Why would someone say this or do this and will then later do that? Use your common sense, use your brains. You may draw certain rational inferences from the evidence.

I called this, I believe I called it in the beginning of the case, this case is a cheap shot. I don't mean to stigmatize the death of Joe Wilkowski as something that is easily put into words, but that's what this case is all about. It's a case of a cheap shot, and I kind of break it down into maybe five sections. When I review the evidence, I will discuss it with you. I think everything will fall into one of five sections in this case.

One, we have an incident which starts out after the Eagles lost to Dallas where a ceratin members of a particular group, Garvey, Gontz, group went to the Hilton. I called the

part of this looking for trouble because that's what I characterize that William Garvey, that man, was doing. He was looking for trouble. That involves the incident with Reives or Miller, in particular, Reives and McMeniman were with him, and it became very important in the case because it involves identification by Andy McMeniman and by Jim Reives as to who did what.

It reminds me of something I do want to point out to you in case I forget later. Andy McMeniman, his testimony was very important in the case. Now, he did not identify, he did not point to that man and say

watched. Sure enough, he predicted right, more than trouble, death. That's what the case is all about, the case of the cheap shot. The defendant got more than he bargained for.

Mr. McMeniman said he saw the victim get hit on the right side of his jaw, were his words. That's what the doctor said, the injury was right back here, that he was sucker punched, I believe were his words, that he was about twenty-five feet away and he saw it, that he didn't wear glasses then, that he had a few beers, but that he knows what he saw. You heard him again today. Was he lying to you? Was McMeniman lying? You decide. What was his interest in the case? What is his motive to lie?

Twenty-five feet, I would

suggest, it about from the wall to the jury box, not that far away to see somebody who is involved with the incident right here, to watch him walk down there, to watch him sucker punch somebody. You have to decide whether all the Commonwealth witnesses that I presented, in particular, Mr. McMeniman, I hoped you looked in his eyes like I asked you to do, I hope you particularly looked in the eyes of the defendant and the defendant's witnesses on the stand. What did you see? Did you see truth? You looked in the eyes of McMeniman. Did you see truth? What is his interest, what is his motive, to lie? Did his testimony have the ring of truth? You have

after he was punched, sucker punched by the defendant, then he hit the door.

When you hit the door, nevertheless, you hit the door with your shoulder, or at the most, your shoulder and hear. Your shoulder absorbs the shock and you don't have a situation where a guy is going to go back and down at the same time with sufficient force to have a door handle cause that type of injury.

Gontz says that the defendant's father said, "Let's get out of here." He denies having anyone say "You had your fun, now leave." He denies anyone hearing, anyone say, "We should fuck him up some more."

I aksed him about anyone saying, "You are lucky that wasn't you," to Miller on the way out, this proud remark by somebody. Nobody heard

define what we mean by these charges at a later point in this Charge.

I first want to deal with the principle known as the presumption of innocence. The fact that a person has been arrested and charged with a crime is not evidence against him. An information which is a document we use to begin a prosecution is merely an accusaion, no more and no less, and it should not be considered by you in any way.

It is a fundamental principle of our system that a person is presumed to be innocent, and this presumption continues with them even while the jury is deliberating its verdict. The presumption that the defendant is innocent remains with him until and unless the jury is convinced of his guilt beyond a reasonable doubt.

It is the Commonwealth's burden to prove each essential element of the crime charged beyond a reasonable doubt. I shall tell you the elements of each crime during a later part of this Charge.

Now, the burden of proof rests on the Commonwealth throughout the case and never shifts to the defendant. There is no burden whatsoever placed upon a defendant either to prove his innocence or even to present any evidence, although the defendant in this case did present evidence. As I have told you, the burden is always on the Commonwealth to convince you of the defendant's guilt beyond a reasonable doubt.

Now, having used the words reasonable doubt, I now want to tell you what we mean by the words reasonable doubt. A reasonable doubt

is an honest and a genuine doubt which can arise solely from the evidence or the lack of evidence.

It is not a doubt which you conjure up in your own mind or force upon yourself in order to avoid the performance of what might be an unpleasant duty.

Now, it is not the Commonwealth's duty to convince you of the defendant's guilt beyond all doubt, nor is it the Commonwealth's duty to convince you of the defendant's guilt beyond a possible doubt. There are so few things in life that are free from all doubt or possible doubt that the law, very wisely, does not require any such finding. Rather, the burden that is imposed upon the Commonwealth is to convince you of the defendant's guilt beyond a reasonable doubt, which I have previously told you is

an honest and genuine doubt which can arise solely from the evidence or the lack of evidence, and it is not a doubt which you force upon yourself or dream up or conjure up in order to avoid the performance of what might be an unpleasant duty.

The Supreme Court of Pennsylvania has defined reasonable doubt in these terms, but I want you to bear in mind all of the other things that I have told you about reasonable doubt when you hear this particular definition that is forthcoming from the Supreme Court.

The Supreme Court says reasonable doubt is such a doubt as would cause a reasonable person to restrain from acting in a matter of importance in his or her own life.

I pass now to a discussion of the word motive. Motive is something

exception to this general rule.

An expert is one who by training, education or experience has a special skill or level of knowledge or expertise in a given field.

In deciding what weight to give to expert testimony, the jury should first consider the expert's qualifications. Ask yourself is the witness indeed an expert? You should consider all of the reasons and facts upon which the expert's opinion is based. The jury is not bound, however, to accept expert testimony merely because it is expert testimony. You are to apply the same general rules relating to believability which I have just discussed with you in assessing the value of the expert testimony.

Now, identification testimony

I now want to define the various crimes that you are to consider and with which this defendant has been charged, and the first crime that I want to discuss, define and analyze for you to a crime known as murder in the third degree. There are three degrees in murder in this Commonwealth, but murder in the third degree is the only one before you and therefore is the only one that I shall define.

Murder in the third degree is the killing where malice was present, but where there was no specific intent to kill. The specific intent required for murder in the third degree is the intent to inflict serious bodily injury but death, nevertheless, resulted.

Now, serious bodily injury is defined as that injury which creates a substantial risk of death or which causes serious permanent disfigurement or impairment of the function of a bodily member or organ.

Now, what is it that I have just told you? To repeat, murder in the third degree is a killing with malice. Now, by malice we mean cruelty, and by the way, we mean any one of these definitions. I shall give you several definitions because certain definitions may be more understandable by some of you than by others and I shall therefore give you several definitions, but all of them, constitute what is known as malice.

Malice is cruelty, hardness of

heart, a mind acting regardless of social duty and fatally bent on mischief. That is what we mean by malice.

So, murder in the third degree is a killing where the killer has malice in his mind and heart, and I have defined malice for you, and to repeat, for murder in the third degree, the intent must be to inflict serious bodily injury but death nevertheless takes place.

Now, I also want to define for you of course voluntary manslaughter. A person commits voluntary manslaughter if he intentionally kills another while he is acting uncontrollably in a state of sudden and intense passion resulting from serious provocation by the person killed.

By passion we mean anger, terror,

rage, jealousy, any of the well-known passions.

The provocation to which he is reacting must be such as would excite an intense passion in a reasonable perons.

Furthermore, there must not have been a sufficient cooling period between the provocation and the killing which would allow the passions to subside.

Now, as to provocation, mere words in and of themselves can never constitute sufficient legal provocation, and you will note that there is no requirements that malice be present. Rather, the intent required may be the intent to kill or inflict serious bodily injury, but you will note that in voluntary manslaughter, the state of mind is one where he is uncontrollably seized

by sudden and intenst passion provoked by the witness. The provocation must be such as would provoke such a passion in a reasonable person.

By involuntary manslaughter, we mean the following: 1. person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful set in a reckless or grossly negligent manner, he causes the death of another person, and that is what we mean by involuntary manslaughter. It's the doing either of a lawful act or an unlawful act but in a reckless or grossly negligent manner.

Now, in connection with voluntary manslaughter, there is an additional situation that I want

to explain to you. A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that if they existed would justify the killing, but his belief is an unreasonable belief. At a later point, I shall discuss justification.

I shall discuss justification at this time. Now, it is not every incident that results in a death that is punishable by the law, and there is in this Commonwealth the defense of justification as applied to the circumstances of this case a principle known as self-defense or self-protection, so when I use the word justification throughout what I am about to tell you, that essentially is what I mean, the

be a defense if the defendant reasonably believed that the force he used was necessary to protect himself against death or serious bodily injury on the same occasion as the defendant used force.

Now, referring to the deadly force situation, in this case, the evidence indicates that the defendant may have used what is called deadly force, but that is a determination which you shall have to make as I have previously instructed you.

Now, special rules apply in determining the availability of the defense of justification when deadly force is involved. Now, in all situations, both deadly or non-deadly force, the Commonwealth has the burden of disproving the defense of justification, and you.

BY MR. NATASI:

Q. Sir, at testimony, what, if any, of the testimony of Mr. McMenamin did you find surprising?

A. Well, quite frankly, when Mr. McMenamin came in and didn't physically say that Mr. Garvey, my client, was the person that he was referring to, but gave a description down to Mr. Garvey's eye teeth, I felt like my pants were down.

My impression of the statement pretrial that I could not identify the person was that I could not identify the person, and I guess I had no idea that somebody was going to come in, and I recall even prior to Mr. McMenamin testifying the thought hadn't occurred to me that someone that was going to come in and say this person I am referring to is wearing number 66, had a name on his lapel, was x inches and feet high, was wearing a jacket, or

had facial hairs, or anything like that, and the reason I recall specifically feeling that way in terms of trial was I remember going in chambers with the District Attorney and the Judge at the time Mr. McMenamin was called to testify by the District Attorney and had advised the Court that

I filed a motion to suppress identification and that if this witness were going to identify my client, that I certainly asked that he not be permitted to do so, testify, and, in fact, I recall the District Attorney's responses at that time being that he would not identify my client.

As the record shows, he certainly came in and gave a most positive description that fit Mr. Garvey, although he couldn't say that Mr. Garvey was the person, and as I said, I was blind sighted kind of by that testimony.

Q. Well, Mr. Lorusso, the statement I am talking about was available to you pretrial.

That's correct, isn't it?

A. Yes, sir.

Q. And you have alluded to page two where you quoted it as saying, "I could not identify the white male who threw the punch."

On the basis of that, you didn't send your investigator to take a statement or to interview Mr. McMenamin.

Isn't that correct?

A. Yes. As I said before, when I read that statement, I thought that his testimony would be a nullity, and the thought just never occurred to me that a man was going to come in and testify in the manner that he did, after having said, "I can't identify him."

Q. Well, isn't there a difference between identifying somebody and describing the clothing that they are wearing?

A. No question about it, and I certainly realize that when he testified at trial.

It was something that didn't occur to me pretrial, when I saw his statement.

Q. Likewise, directing your attention to page three and page four of the statement, isn't there a portion of this where he specifically denies Mr. Gontz as the buddy of the man who threw the punch?

Isn't that correct?

A. My impression, based upon my various interview, I guess I was under the impression that was Mr. Gontz, and I am quite confident today it probably was Mr. Gontz who was being identified.